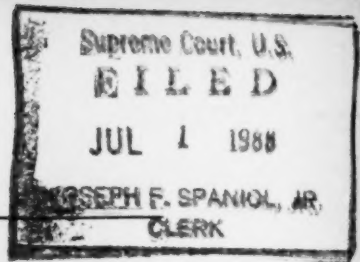


(2)
No. 87-1971

In The



SUPREME COURT OF THE UNITED STATES
October Term, 1987

PATRICIA ANN GRIFFIN
by and through her next friend and natural
father, **LARRY D. GRIFFIN**; and,
LARRY D. GRIFFIN, individually,
Petitioners,
vs.
FORD MOTOR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Patrick J. Farrell, Jr.*
Patricia Guilday
Fuller, Johnson & Farrell, P.A.
111 North Calhoun Street
Post Office Box 1739
Tallahassee, Florida 32302
(904) 224-4663

John M. Thomas
Office of the General Counsel
Ford Motor Company
300 Parklane Towers West
Dearborn, Michigan 48126
(313) 322-6743

Attorneys for Respondent

*Counsel of Record

24 pp



QUESTIONS PRESENTED FOR REVIEW

1. Whether Plaintiffs were denied procedural due process, i.e., whether Plaintiffs were accorded an opportunity to be heard on the merits of their claims.

2. Whether Plaintiffs were denied substantive due process, i.e., whether the Florida Supreme Court or the Florida Legislature acted arbitrarily or irrationally in denying Plaintiffs a substantive right of recovery.

PARTIES TO THE PROCEEDING

The parties to this case are Plaintiffs Patricia Ann Griffin and Larry Griffin and Defendant Ford Motor Company ["Ford"]. The list of Ford Motor Company's subsidiaries and affiliates required by Rule 28.1 is attached as the Appendix.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT:	5
<p>THE DECISION BELOW IS CORRECT, CONSISTENT WITH DECISIONS OF THE FLORIDA SUPREME COURT AND OTHER COURTS OF APPEAL, AND NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY THIS COURT</p>	
CONCLUSION	12
APPENDIX.....	App. 1

TABLE OF AUTHORITIES

	PAGE
Cases:	
<i>Battilla v. Allis Chalmers Mfg. Co.</i> , 392 So.2d 874 (Fla. 1980)	2, 5, 6, 7
<i>Bowman v. Niagara Machine & Tool Works, Inc.</i> , 832 F.2d 1052 (7th Cir. 1987)	8, 10
<i>Brinkerhoff-Faris Trust & Savings Co. v. Hill</i> , 281 U.S. 673 (1930)	9
<i>Clausell v. Hobart Corp.</i> , 515 So.2d 1275 (Fla. 1987), <i>appeal dismissed for want of jurisdiction; petition for cert. denied</i> , ___ U.S. ___, 108 S. Ct. 1459 (1988) ...	4, 5, 6, 7
<i>Eddings v. Volkswagenwerk, A.G.</i> , 835 F.2d 1369 (11th Cir. 1988)	4
<i>Hammon v. United States</i> , 786 F.2d 8 (1st Cir. 1986)	10
<i>Hicks v. Miranda</i> , 422 U.S. 332 (1975)	11

TABLE OF AUTHORITIES (continued)

PAGE

Cases:

<i>In Re: Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987), cert. denied sub. nom. Konizeski v. Livemore Labs, ___ U.S. ___, 108 S. Ct. 1076 (1988)</i>	<i>7, 8, 9, 10</i>
<i>Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)</i>	<i>7, 8, 9</i>
<i>Melendez v. Dreis & Krump Mfg. Co., 515 So.2d 735 (Fla. 1987)</i>	<i>3</i>
<i>Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed for want of a substantial federal question, 475 U.S. 1114 (1986)</i>	<i>2, 3, 4, 5, 6, 7, 11</i>
<i>Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972)</i>	<i>8</i>
<i>Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)</i>	<i>10</i>
Florida Statutes:	
Fla. Stat. §95.031 (2) (1985)	1, 2



STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

At the time the accident giving rise to this case occurred, Fla. Stat. §95.031 (2) (1985) provided as follows:

Actions for products liability and fraud under s. 95.11 (3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11 (3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

The due process clauses of the fifth and fourteenth amendments are correctly set forth in Plaintiffs' petition.

STATEMENT OF THE CASE

This product liability action arises out of a January 23, 1985, accident involving a thirteen year old vehicle manufactured by Ford Motor Company ("Ford"). Patricia Griffin was injured in the accident.

At the time of the accident, the Florida product liability statute of repose, Fla. Stat. §95.031(2) (1985), provided that a product liability action must be brought within twelve years after the product's first sale. Under this statute, a person injured more than twelve years after the product's first sale had no cause of action against the product manufacturer. However, in 1980 the Florida Supreme Court had held that this statute violated the Florida Constitution when it was applied in that situation. *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980).

On August 25, 1985, after the accident in this case, the Florida Supreme Court overruled *Battilla* and held that the statute of repose did not violate the Florida Constitution when applied to cases where the injury did not occur until after the repose period had expired. *Pullum v. Cincinnati, Inc.*, 476

So.2d 657 (Fla. 1985), *appeal dismissed for want of a substantial federal question*, 475 U.S. 1114 (1986).

Shortly after the decision in *Pullum*, Ms. Griffin and her father ("Plaintiffs") instituted this action against Ford in the United States District Court for the Northern District of Florida. Ford moved for summary judgment on the basis of *Pullum* and the statute of repose. In response, Plaintiffs argued that *Pullum* should not be applied retroactively to injuries that occurred prior to *Pullum*. The trial court rejected Plaintiffs' argument and granted Ford's motion.

Plaintiffs moved for reconsideration, contending for the first time that application of the statute of repose and *Pullum* to bar their claims deprived them of vested rights in violation of the Florida and United States Constitutions. The trial court denied the motion, and Plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit.

While Plaintiffs' appeal in this case was pending in the Eleventh Circuit, the Florida Supreme Court held, as a matter of state law, that its decision in *Pullum* was retroactive and applied to cases that arose before the date of that decision. *Melendez v. Dreis & Krump Mfg. Co.*, 515 So.2d 735 (Fla.

1987). The Florida Supreme Court also ruled that retroactive application of *Pullum* did not violate the due process clause of the United States Constitution. *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987). Shortly after the Florida Supreme Court's decision in *Clausell*, the Eleventh Circuit issued its opinion in this case, and several other cases, also holding that the retroactive application of *Pullum* did not violate due process. *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir. 1988).

Plaintiffs in *Clausell* filed an appeal or, in the alternative, a petition for writ of certiorari, with this Court. Plaintiffs in this case moved for rehearing by the Eleventh Circuit. The Eleventh Circuit denied rehearing in this case on March 2, 1988. In April, this Court dismissed the appeal in *Clausell* for want of jurisdiction. This Court also denied the petition for writ of certiorari in *Clausell*. *Clausell v. Hobart Corp.*, ___ U.S. ___, 108 S. Ct. 1459 (1988).

Plaintiffs in this case, apparently unaware of this Court's ruling in *Clausell*, filed a petition for writ of certiorari on May 31, 1988. The petition was received by counsel for Ford on June 1, 1988.

ARGUMENT

THE DECISION BELOW IS CORRECT, CONSISTENT WITH DECISIONS OF THE FLORIDA SUPREME COURT AND OTHER COURTS OF APPEAL, AND NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY THIS COURT.

Plaintiffs argue that at the time the accident occurred they acquired causes of action in tort as a result of the Florida Supreme Court's decision in *Battilla*, that their accrued causes of action were a property right protected by the due process clauses of the fifth and fourteenth amendments, and that they were denied due process rights when the Florida Supreme Court overruled *Battilla* in *Pullum* and effectively abrogated their causes of action without a hearing.

This is the precise argument that was made and rejected by the Florida Supreme Court in *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987). The relevant facts of *Clausell* were identical to the facts of this case: the accident in *Clausell*, like the accident in this case, occurred after the twelve year repose period had expired. The accident in *Clausell*, like the accident in this case, occurred after the

decision in *Battilla* but before the decision in *Pullum*. The trial court in *Clausell*, like the trial court in this case, granted summary judgment on the basis of *Pullum* and the statute of repose. The plaintiffs in *Clausell*, like the plaintiffs in this case, argued on appeal that the abrogation of their accrued causes of action violated the due process clauses of the fifth and fourteenth amendments. The appellate courts in both cases rejected this argument, and the plaintiffs in both cases sought certiorari in this Court, making the same arguments and citing the same principal authorities.

This Court denied certiorari in *Clausell* only a month and a half before Plaintiffs filed their petition for certiorari in this case. *Clausell* is indistinguishable from this case, and if *Clausell* did not merit review by this Court, neither does this case.

None of the factors listed in Rule 17 support review of this case by this Court. The decision of the Eleventh Circuit is not in conflict with any other federal court of appeals, nor is it in conflict with a state court of last resort. To the contrary, the Florida Supreme Court in *Clausell* came to the same conclusion as the Eleventh Circuit in this case. Plaintiffs claim that the decision of the Eleventh Circuit conflicts with

applicable decisions of this Court but, as demonstrated below, Plaintiffs have misperceived the import of those cases. The issue here involves only a few cases in the state of Florida, in which the claim arose after *Battilla* and before *Pullum*, most of which by now have been finally resolved by settlement or judgment, and the issue involved has little, if any, significance beyond this case.

In any event, however, the decision of the Florida Supreme Court in *Clausell* and the decision of the Eleventh Circuit in this case were correct. It is true as the plaintiffs in both cases contended, that a cause of action is a property right which cannot be taken without "due process." See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). "To say that a cause of action is a species of protected property, however, is not to answer the question of what process is due." *In Re: Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 989 (9th Cir. 1987), cert. denied sub. nom. *Konizeski v. Livemore Labs*, ___ U.S. ___, 108 S. Ct. 1076 (1988) (hereinafter "*Atmospheric Testing Litigation*"). Rather, the requirements of both procedural and substantive due process must be examined.

Plaintiffs characterize their argument as a procedural due process argument. (Petition at 32 n.7) Procedural due process requires that plaintiffs be given notice and an opportunity to be heard on the merits of a cause of action or defense recognized by state law. *See, e.g., Atmospheric Testing Litigation*, 820 F.2d at 989. Plaintiffs in this case had notice and an opportunity to establish a substantive right of recovery. Unfortunately, however, Plaintiffs at the time of the hearing had no substantive right to recover under Florida law because their injury occurred after the twelve year repose period had expired; Plaintiffs literally had no cause of action. *See, e.g., Rosenberg v. of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972) (where injury occurs after a repose period has expired, "[t]he injured person literally has no cause of action. . .; " "[t]he function of the statute is thus rather to define substantive rights than to alter or modify a remedy"); *Bowman v. Niagara Machine & Tool Works, Inc.*, 832 F.2d 1052 (7th Cir. 1987).

Thus, Plaintiffs' procedural due process claim is without merit, and the principal cases they cite are inapplicable. In both *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982),

and *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), the state recognized a substantive right but arbitrarily deprived the claimant of a procedure to enforce that right. The opposite is true here; Plaintiffs had a procedure to enforce what substantive rights they had, but in fact had no such rights under controlling state law. This Court in *Logan* expressly recognized that "the State remains free to create substantive defenses or immunities for use in adjudication -- or to eliminate its statutorily created causes of action altogether." 455 U.S. at 432.

The decision in *Atmospheric Testing Litigation* is particularly relevant here. In that case, a federal statute abrogated the plaintiff's accrued causes of action against private contractors who participated in nuclear weapons testing. In that case, as here, the plaintiffs claimed that the abrogation of their accrued causes of action violated procedural due process. The Ninth Circuit rejected this claim:

On notice of hearing, appellants [plaintiffs] were given the opportunity to present their claims before the district court. The requirements of procedural due process were thereby satisfied. The plaintiffs' claims were simply unavailing under the procedure pursued by them. Procedural due process, however, does not guarantee that a party will prevail.

820 F.2d at 990. *See also Bowman v. Niagara Machine and Tool Works, Inc.*, 832 F.2d 1052, 1054 (7th Cir. 1987) (Plaintiff denied recovery on basis of statute of repose "cannot claim he has been denied access to court simply because the Indiana legislature has restricted a particular cause of action in a way that makes it unavailable to him. Such an approach confuses 'access' with 'success,' and Bowman is not constitutionally entitled to the latter.").

Plaintiffs' real claim appears to be that the state of Florida denied them substantive due process by denying them a substantive right of recovery. *See Atmospheric Testing Litigation*, 820 F.2d at 990 ("To the extent that §2212 may have abrogated appellants' causes of action . . . , this Court's analysis will focus on substantive due process.") Absent a fundamental right or suspect classification, however, substantive due process is satisfied if the challenged state action has a rational basis and is not arbitrary or irrational. (*See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Atmospheric Testing Litigation*, 820 F.2d at 990; *Hammon v. United States*, 786 F.2d 8 (1st Cir. 1986).

Plaintiffs in this case do not even attempt to argue that the Florida Legislature or the Florida Supreme Court acted

arbitrarily or irrationally. The legislature intended the statute of repose to become effective in 1975, and application of the statute in this case therefore furthers the legislature's purpose. The Florida Supreme Court found that "the legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and. . .that twelve years is a reasonable time for exposure to liability." *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla. 1985), *appeal dismissed for want of a substantial federal question*, 475 U.S. 1114 (1986). The Florida Supreme Court in *Pullum*, therefore, concluded that the statute of repose had a rational and legitimate basis. 476 So.2d at 660. This Court's dismissal of the appeal in *Pullum* for want of a substantial federal question is a disposition on the merits of this issue. See *Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Patrick J. Farrell, Jr.*
Patricia Guilday
Fuller, Johnson & Farrell, P.A.
111 North Calhoun Street
Post Office Box 1739
Tallahassee, Florida 32302
(904) 224-4663

John M. Thomas
Office of the General Counsel
Ford Motor Company
300 Parklane Towers West
Dearborn, Michigan 48126
(313) 322-6743

Attorneys for Respondent

*Counsel of Record

July 1, 1988

APPENDIX

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Respondent Ford Motor Company (U.S. Sup.Ct. Rule 28.1).

Respondent Ford Motor Company has an interest of 50% or greater, but less than 100% in the following entities:

- Oy Ford Ab
- Ford Motor Company Aktiebolag
- Eveleth Taconite Company
- Renaissance Center Partnership
- Fairlane Woods Associates (A Partnership)
- Park Ridge Corporation
- Ford Motor Company Limited
- Ford Motor Credit Company Limited
- Henry Ford & Son (Finance) Limited
- Ford-Werke AG
- Ford Credit Bank AG
- Ford Motor Company of Canada, Limited
- Ensate Limited
- Ford Motor Company of Australia Limited
- Ford Motor Company of New Zealand Limited
- Ford France S.A.
- Ford Motor Company (Belgium) N.V.
- Ford Credit N.V.
- Ford Italiana S.p.A.

App.2

Ford Credit S.p.A.
Ford Leasing S.p.A.
Ford Motor Company A/S
Ford Credit A/S
Ford Motor Company S.A. de C.V.
Ford Nederland B.V.
Ford Credit B.V.
Ford Leasing S.A.
Ford Credit S.A.
Transcon Insurance Limited
Ford Lio Ho Motor Company, Ltd.
Bayou City Ford Truck Sales
Beltway Ford Truck Sales
Bi-State Ford Truck Sales
Bridge-Haven Ford Truck Sales
Central Ford Truck Sales
Coastal Ford Truck Sales
Crossroads Ford Truck Sales
Deacon Ford Truck Sales
Freeway Ford Truck Sales
Keystone Ford Truck Sales
Lakeland Ford Truck Sales
Liberty Ford Truck Sales
Mid-America Ford Truck Sales
Mid-Cal Ford Truck Sales
Mid-States Ford Truck Sales
Miramar Ford Truck Sales
Mission Valley Ford Truck Sales
Motor City Ford Truck, Inc.
Northside Ford Truck Sales
River City Ford Truck Sales
Sacramento Valley Ford Truck Sales
Shamrock Ford Truck Sales
Sooner State Ford Truck Sales
Southside Ford Truck Sales

App.3

Trans-West Ford Truck Sales
West Gate Ford Truck Sales
Delta Truck Lease, Inc.
Airport Lincoln-Mercury Sales
Al Meyer Ford, Inc.
Alberts-Johnson Ford, Inc.
Albion Ford-Mercury, Inc.
Allegan Ford-Mercury Sales, Inc.
Alpena Ford Lincoln-Mercury, Inc.
Alpha Lincoln-Mercury Imports
Altoona Ford, Inc.
Auburn Ford Lincoln-Mercury
Aurora Lincoln-Mercury, Inc.
Avalon Lincoln-Mercury, Inc.
Bannister Lincoln-Mercury, Inc.
Baranco Lincoln-Mercury, Inc.
Bear Country Ford Lincoln-Mercury
Beloit Ford Lincoln-Mercury
Berens Lincoln-Mercury, Inc.
Berkeley Lincoln-Mercury, Inc.
Big Valley Ford Lincoln-Mercury
Buffalo Ford-Mercury, Inc.
Burnsville Lincoln-Mercury, Inc.
C & L Lincoln-Mercury, Inc.
Campus Ford, Inc.
Castle Rock Ford-Mercury, Inc.
Centralia Ford-Mercury, Inc.
Champion Ford Sales, Inc.
Clinton Ford Lincoln-Mercury
Coastal Ford, Inc.
Columbus Ford-Mercury, Inc.
Community Ford-Mercury, Inc.
Conway Ford, Inc.

Copper County Ford Lincoln-Mercury
Cornelia Ford Lincoln-Mercury
County Ford, Inc.
Courtesy Automobile Sales, Inc.
Courtesy Ford Lincoln-Mercury
Cranberry Lincoln-Mercury, Inc.
Crossroads Ford-Mercury, Inc.
Crown Lincoln-Mercury, Inc.
Del Perry Ford, Inc.
Delaware Ford Lincoln-Mercury
Delta Ford Sales, Inc.
Duryea Ford, Inc.
Dyersburg Ford Lincoln-Mercury
Edgar Ford, Inc.
El Dorado Ford Lincoln-Mercury
Empire Ford, Inc.
Fairlane Lincoln-Mercury, Inc.
Fort Valley Ford, Inc.
Francis Scott Key Lincoln-Mercury
Freedom Ford Sales, Inc.
Frontier Lincoln-Mercury, Inc.
Ft. Walton Beach Lincoln-Mercury
Geneva Ford Sales, Inc.
Gold Star Ford Lincoln-Mercury
Golden Ford-Mercury, Inc.
Green River Ford-Mercury, Inc.
Greenville Ford-Mercury, Inc.
Harbor Lincoln-Mercury, Inc.
Heritage Ford-Mercury, Inc.
Heritage Lincoln-Mercury, Inc.
Highland Lincoln-Mercury, Inc.
Hillsboro Ford-Mercury Sales, Inc.
Hilltop Ford, Inc.
Hub City Ford-Mercury, Inc.

App.5

Hunt County Ford Lincoln-Mercury
Illini Lincoln-Mercury Sales
Independence Ford, Inc.
Jim Warren Ford-Mercury, Inc.
Lakeland Ford Lincoln-Mercury
Leader Ford, Inc.
Liberty Ford Lincoln-Mercury
Lompoc Ford, Inc.
Los Banos Ford Lincoln-Mercury
Madison Ford Mercury, Inc.
Manhattan Ford Lincoln-Mercury
Marion Lincoln-Mercury, Inc.
McGehee Auto Plaza, Inc.
Mc Intosh O'Hara Lincoln-Mercury
Miramar Lincoln-Mercury, Inc.
Mon Valley Lincoln-Mercury, Inc.
Montesano Ford-Mercury, Inc.
Monticello Ford Lincoln-Mercury
Natchitoches Ford Sales, Inc.
New Castle Ford Lincoln-Mercury
Noble Ford Lincoln-Mercury
Norris Lake Ford Lincoln-Mercury
North Alabama Ford-Lincoln-Mercury
North Country Ford Lincoln-Mercury
Northampton Ford, Inc.
Northwoods Ford-Lincoln-Mercury
Odessa Ford Mercury, Inc.
Olympic Ford of Marysville
Ottawa Ford Lincoln-Mercury
Park Ford Sales, Inc.
Pasadena Lincoln-Mercury, Inc.
Perry Lincoln-Mercury-Merkur
Plainfield Lincoln-Mercury

App.6

Progressive Ford-Mercury, Inc.
Quality Ford-Mercury, Inc.
Robert Woodson Lincoln-Mercury
Rochester Lincoln-Mercury, Inc.
Royal Lincoln-Mercury Sales, Inc.
Royal Ford Lincoln-Mercury, Inc.
Shoals Ford, Inc.
Sonoma Ford, Inc. DBA Sonoma
Suburban Ford Lincoln-Mercury
Sumter Ford Lincoln-Mercury, Inc.
Sunbelt Ford-Mercury, Inc.
Sunrise Ford Lincoln-Mercury
Swainsboro Ford Lincoln-Mercury
Toner Ford Mercury, Inc.
Town & Country Lincoln-Mercury
Tropical Ford, Inc.
Tuskegee Ford-Mercury, Inc.
Union City Ford Lincoln-Mercury
University Ford of Peoria, Inc.
Verde Valley Ford Lincoln-Mercury
Victory Ford, Inc.
Wauseon Ford, Inc.
Waynesboro Sales & Service, Inc.
West Covina Lincoln-Mercury, Inc.
West Suburban Ford, Inc.
Western Ford Mercury, Inc.
Westwood Ford Lincoln-Mercury, Inc.

